UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ROBERT DESKINS, appellant, v. DEPARTMENT OF THE NAVY, agency.	)	DOCKET NUMBER DC04328410014 Date: November 19, 1985

Before

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

OPINION AND ORDER

The agency removed appellant from his position of Computer Programmer Analyst, GS-11, based on charges of unacceptable performance. Following an appeal to the Board's Washington, D.C. Regional Office, the presiding official sustained the charges and found the appellant failed to prove his affirmative defense of discrimination on the basis of handicapping conditions (alcoholism and mental impairment).

The appellant filed a petition for review of the initial decision and the agency filed a response in opposition to the petition. In an Order dated November 5, 1984, the Board reopened the appeal under 5 C.F.R. § 1201.117 and remanded

the case to the regional office for the limited purpose of allowing the agency to submit evidence regarding OPM approval of its performance appraisal system and allowing the appellant to submit rebuttal evidence. See Griffin v. Department of the Army, 23 M.S.P.R. 657 (1984). In a supplemental decision dated February 22, 1985, the presiding official found that the agency's removal action had been taken under an OPM-approved performance appraisal system. The supplemental record contains a copy of an October 8, 1980, letter from OPM to the agency approving its performance appraisal system. No exceptions to the supplemental decision have been filed by the parties. We hereby GRANT the petition. 5 U.S.C. § 7701(e).

The appellant first contends that the agency failed to prove by substantial evidence that his performance was unacceptable. The appellant contends that his project leader's actions interfered with his performance to the extent that he was not able to complete properly tasks assigned to him during a 50-day period in which he was to demonstrate acceptable performance. We agree.

In Sandland v. General Services Administration, 23 M.S.P.R. 583 (1984), the Board held that an employee's right to a reasonable opportunity to improve is a substantive right. The Board determined that once an agency establishes a prima facie case that it provided a reasonable opportunity to improve, the appellant may then present evidence to challenge the reasonableness of that opportunity to improve.

The appellant testified that his project leader, Mr. George Sanders, subjected him to verbal abuse, insults, and harassment that interfered with his ability to work. Tr. Vol. II, 33-35. Other agency employees testified that the project leader shouted at the appellant during work reviews and that he reacted particularly hostilely towards

the appellant. Tr. Vol. II, 8-11. There was also testimony that the project leader told another employee, at some point during the 50-day "grace period" that the appellant would not be employed at the agency for very long. Tr. Vol. II at 10. Agency witnesses also testified to the volatile nature of the project leader, and corroborated appellant's evidence that he acted in an exasperated and heated manner. Tr. Vol I, 139-141.1/

In addition, testimony indicated that while all other team members were granted overtime and computer access because their projects were 12-14 weeks late, the project leader denied the appellant's requests for overtime and computer access. Tr. Vol. I, 159-171, Vol. II, 11.

The evidence of record, therefore, indicates that during the period in which he was to demonstrate acceptable performance the appellant was subjected to verbal abuse and denied the additional time and facilities necessary to complete the projects. Thus, we find that, under the circumstances of this case, the agency denied appellant a reasonable opportunity to demonstrate improved performance.

The appellant also contends that the presiding official erred when she found that the agency was not aware of his alcoholism and mental illness and that, in any event, the

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1/ The appellant testified to other instances of interference with his ability to perform. In one instance, the project leader told the appellant that he reported him for insubordination for using a computer program ordinarily used in the office. Subsequently, the appellant learned that the project leader had in fact not cited him for insubordination. Tr. Vol. II, 36. In another instance, the project leader disapproved appellant's work when he had included information the project leader had previously requested be included before he would approve it. Tr. Vol. II, 51-52. The project leader's approval was required before he could complete the next step of the project assigned to him to show improvement. Tr. Vol. II, 48.

agency had accommodated them by mentioning to the appellant, in an off-handed manner, that he could go to a counselor if he had a problem. Appellant's assertion is well-taken.

The presiding official found that appellant failed to establish that the agency knew of his alcohol abuse. It is clear from the testimony, however, that agency officials knew there was a problem with alcohol. The agency's division manager in appellant's office (who also served as the oral reply official) had known the appellant to drink to excess on a number of occasions at local bars, Tr. Vol. I, 75-77, and at office functions. Tr. Vol. I, 5, 95, 145. Furthermore, during the oral reply the appellant told the division manager that he had been arrested for driving while intoxicated. Tr. Vol. I, 41. Appellant also testified that, although he did not drink while on duty, it often affected his work. Tr. Vol. II, 73-74. All of these facts indicate that the agency should have been aware of the appellant's alcohol abuse. At the very least, once the appellant informed the division manager that he had been arrested for driving while intoxicated, the official should have suspected that an alcohol abuse problem existed. See Swafford v. Tennessee Valley Authority, MSPB Docket No. AT07528110240 (December 21, 1983) (the circumstances presented enough information so that the supervisor should have suspected the employee had an alcohol problem).

The appellant next contends the presiding official erred in finding that, even if the agency knew of his alcohol problem, it had offered the appellant an opportunity at rehabilitation. We agree with the appellant. The only evidence of record which remotely resembles such an offer is the testimony of appellant's project leader that he had informed appellant that if he had a problem, he could see a counselor. Tr. Vol. I, 151. The Board has held that simply

suggesting rehabilitation is insufficient. An agency must offer the employee rehabilitative assistance and allow him an opportunity to take leave for treatment before initiating any disciplinary action for performance problems. See Ruzek v. General Services Administration , 7 MSPB 307, 311 (1981). Under the circumstances of this appeal, we find that the agency failed to offer any real opportunity for rehabilitation as required by the Board's decision in Ruzek , supra . The agency action removing appellant, therefore, cannot be sustained.

Based on the foregoing, the initial decision, dated January 27, 1984, is REVERSED, and the agency action is NOT SUSTAINED. 2 /

The agency is hereby ORDERED to cancel the removal action, and to award back pay and other benefits for the time period involved, in accordance with 5 C.F.R. § 550.805.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(c). The agency is ORDERED to furnish proof of compliance with this order to the Office of the Clerk of the Board within twenty (20) days of the date of issuance of this order. Any petition for enforcement of this order shall be made to the Washington, D.C. Regional Office in accordance with 5 C.F.R. § 1201.181(a).

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

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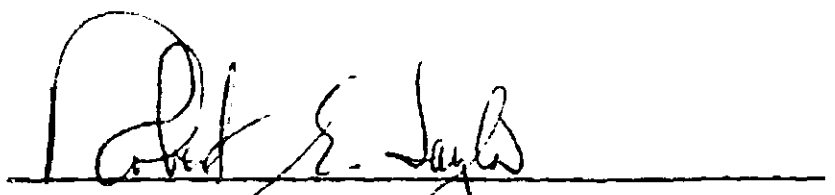
2 /Because of our disposition of the appeal as noted above, we find it unnecessary to address appellant's remaining arguments.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. §§ 2000e5(f) - (k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review, if the court has jurisdiction, of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the court no later than thirty days after the appellant's receipt of this order.

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.